IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER, Plaintiff and Respondent, vs. CITY OF HAYWARD, et al., Defendants and Appellants.	Case No. A149328 Alameda County Superior Court, Case No. RG15-785743

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

COUNTY OF ALAMEDA

Hon. Evelio M. Grillo, Presiding

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons to list in this certificate. See Cal. Rules of Court, Rule 8.208(e)(3).

Dated: June 28, 2017

Respectfully submitted,

/s/ Amitai Schwartz
Amitai Schwartz
Attorney for Respondent,
National Lawyers Guild,
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STATEMENT OF THE CASE

I. *Nature of the Action, Relief Sought, and Judgment of the Superior Court*

This is an appeal from a judgment ordering the clerk of the Superior Court to issue a writ of mandate directing the City of Hayward to refund to plaintiff National Lawyers Guild, San Francisco Bay Area Chapter labor costs previously charged and collected for the disclosure of electronic records under the California Public Records Act. JA 663. The clerk issued the writ. JA 660. Defendants appealed. JA 671.

II. *Finality and Appealability of the Judgment*

Judgment was entered on July 21, 2016. JA 663. Notice of entry of judgment was served on July 22, 2016. JA 670.

Defendants filed a timely notice of appeal on August 8, 2016 (JA 671), within 60 days of notice of entry of judgment. Cal. Rules of Court, Rule 8.104 (a)(1)(B).

Although orders pursuant to the California Public Records Act are ordinarily not appealable, the judgment in this case does not require disclosure of records as contemplated by Government Code §6259(c) ("an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken"). The Judgment and Writ of Mandate require

the return of money. JA 660, 663.Therefore, respondents agree with appellants that the judgment is appealable pursuant to Code Civ. Proc. §904.1(a)(1). *See Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal. App. 4th 1381, 1385-1388 (orders pertaining to attorneys' fees under the Public Records Act are reviewable on appeal); *North County Parents Organization For Children with Special Needs v. Department of Education* (1994) 23 Cal.App.4th 144; (treating order limiting costs charged under the Public Records Act as appealable).

However, if this court determines that the judgment is not appealable, then we also agree that the appeal should be treated as a writ proceeding. *See Coronado Police Officers Association v. Carroll* (2003) 106 Cal.App.4th 1001, 1005-1006.

III. *Introduction*

The plaintiff National Lawyers Guild, San Francisco Bay Area Chapter [hereafter "Lawyers Guild"] requested records from the City of Hayward related to its police departments' actions in December 2014 while providing mutual aid in the City of Berkeley in connection with public demonstrations against the killing by police officers of Michael Brown in Ferguson, Missouri, and Eric Garner in Staten Island, New York. The killings received national attention, precipitating and renewing increased scrutiny of police conduct. The demonstrations resulted in injuries and arrests. The records requested included video captured by body worn police cameras used by members of the Hayward Police Department.

Before disclosing copies of the videos the City redacted out some portions, claiming information in those portions was exempt by law. The Lawyers Guild did not challenge the decision to make redactions or challenge the redactions.

However, before Hayward would make copies of the videos available, the City charged the Lawyers Guild for time spent by its employees locating the videos, reviewing the videos, and the time spent making the redactions. While protesting this condition of production, the Lawyers Guild paid the requested charges so that it could promptly obtain the copies. JA 26. It then sued for return of the money. JA 4.

The sole issue presented on this appeal is whether Hayward can lawfully impose these charges as a condition of producing copies of the original videos pursuant to Government Code §6253.9(b)(2), a subsection of the California Public Records Act. Section 6253.9(b)(2) allows a public entity under some circumstances to charge the costs of producing electronic records that require "data compilation, extraction, or programming to produce the record."

In the superior court the City relied on two separate sections of the Public Records Act as the basis for the charges it imposed. First, it relied on section 6253.9(b)(2). Second, it relied on the balancing test permitted by Gov. Code §6255(a), which exempts disclosure of records when "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." The superior court

addressed both contentions. It held that neither provision permitted Hayward to charge for anything other than the actual duplication of the redacted videos. JA 619.

The City has now abandoned its contention that section 6255(a) justifies the charges in this case. The City has confined this appeal to the scope of §6253.9(b). See Appellants' Opening Brief at 1 ("the sole issue raised by this appeal is whether the PRA – in particular, the cost allocation provisions for electronic records in §6253.9(b)" allow the City to recoup its costs); *Id.* at 21 (This Court must "decide the proper interpretation of §6253.9 "on a de novo basis."); *Id.* at 27 ("To determine whether the City properly charged NLG for the cost of redacting body-camera videos, it is necessary to construe §6259."). Accordingly, the Lawyers Guild will not address the application of section 6255(a) to this case.

IV. Summary of Significant Facts

A. The Production of the Police Body Camera Videos

The Hayward Police Department participated in policing a protests and demonstrations in Berkeley in December 2014. JA 6, 14, 26. Some of the Hayward officers had body worn video cameras that recorded police actions and activities of demonstrators. JA 7, 14. Pursuant to the California Public Records Act the Lawyers Guild requested copies of records related to the police actions. JA 6, 26. Hayward produced paper records and identified relevant body worn camera videos, which had previously been uploaded to a cloud based

storage system known as "Evidence.com." JA 43. The videos were stored in an MP4 digital format. JA 50, 53.

City employee Nathaniel Roush identified the relevant videos. He took 4.9 hours for this task. JA 53-56. The Lawyers Guild then narrowed its request to about six hours of video, covering five police officers and three time periods. JA 7, 15. Adam Perez, the Police Department's records administrator, then edited the videos by redacting portions that the City believed were exempt by law from mandatory disclosure. JA 81-148.

Perez had never edited video previously and had not worked on redacting exempt portions of video. He found a publicly available computer program known as Microsoft Windows Movie Maker. JA 102-103. He had never used Movie Maker before. JA 131-132. After working his way through the project, he ended up with a redacted video with some exempt portions of video and audio removed. JA 22-33. Perez took about 35.3 hours both learning and using Movie Maker to produce the disclosed video. JA 164. The edited video totaled 232 minutes. JA 26.

The City charged $2,939.58, using the time spent by Roush and Perez, multiplied by their hourly salaries, plus benefits. JA 164. The Lawyers Guild paid the charges and received the videos. JA 7-8,15-16, 26.

Subsequently, the Lawyers Guild requested additional video footage. JA 26-27. At this point the City had some experience using Movie Maker, edited the responsive footage, and made copies

available for $308.89. JA 26, 75. The Lawyers Guild paid the charges and received two videos totaling 65 minutes. JA 27.

The Lawyers Guild did not challenge the City's claim that redacted portions of the videos were exempt from mandatory disclosure.

B. The Proceeding Below

The Lawyers Guild filed its petition for Declaratory and Injunctive Relief and a Writ of Mandate in the Superior Court on September 15, 2015. JA 4.[1] The material facts were undisputed. See Appellants' Opening Brief at 15. City employees Roush and Perez were deposed by the Lawyers Guild. JA29, 32-161. Based on the City's admissions in its Answer to the Petition and the deposition testimony, the Lawyers Guild moved for a peremptory writ of mandate. JA 23. Following an initial hearing, and following the superior court's suggestion, Perez was deposed a second time. JA 575-615.

The court held a further hearing on March 29, 2016. JA 617. After the hearing the court issued an order granting the Petition for a Writ of Mandate, directing the clerk to order Hayward to refund

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[1] A requester may pay a challenged fee in order quickly to obtain copies of public records and then file suit under the Public Records Act seeking judicial review of the fee. *See North County Parents Organization For Children with Special Needs v. Department of Education* (1994) 23 Cal.App.4th 144, 148. Mandamus is a proper means to obtain a refund of money. Code Civ. Proc. §1095; *See Hi Desert Medical Center v. Douglas* (2015) 239 Cal.App.4th 717, 736.

$3,246.47, covering the two payments made by the Lawyers Guild, minus one dollar for the cost of the disc used to duplicate the edited videos. JA 619.

The court held "as a matter of law that in Government Code 6253(b) and 6253.9(a)(2), the phrase 'data compilation, extraction, or programming to produce the record' does not refer to making a redacted version of an existing record public record." JA 620.[2] The court said that a public agency cannot charge a requester for the cost of removing information from an existing record. JA 628-629. "The phrase 'data compilation, extraction, or programming to produce the record' therefore logically refers to the construction or production of data to be produced to the recipient, and not to the creation of a redacted version of a previously existing public record." JA 630.

The court concluded that "Hayward therefore could not condition production of the redacted videos on payment both of the $1 direct cost of production and $3,246.47 in staff time related to redacting the videos." JA 621.

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[2] With respect to the City's contention that its charges were justified by section 6255(a), the court held "as a matter of law that under Government Code 6255, the CPRA's catch-all exemption, a public agency asserting that 'the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record' may consider the expense and inconvenience of all aspects of responding to the CPRA request, including the cost of redacting public records." JA 620. However, the court went on to find that "Hayward has not demonstrated that its CPRA compliance imposed an undue burden over and above the regular expected burden." JA 621.

Judgment was subsequently entered on July 21, 2016. JA 663. The writ was issued by the clerk on the same day. JA 660.

This appeal follows.

ARGUMENT

I. The Standard of Review

The trial court's interpretation of the California Public Records Act is reviewed de novo. *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387. This is true of any legal decision regarding disclosure of records under the Act. *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.

The fundamental task is to determine the Legislature's intent. A court must first examine the language of the statute, giving it a plain and commonsense meaning. The language must be examined in the context of the entire statutory scheme, including the significance of every word, phrase, sentence, and part of an act. If the statutory language permits more than one reasonable interpretation, courts may consider the statute's purpose, legislative, history, and public policy. *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616-617; *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165-166. And, "To the extent this examination of the statutory language leaves uncertainty, it is appropriate to consider 'the consequences that will flow from a particular interpretation.'" *Commission of Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 290 (internal citations omitted).

When any portion of the California Public Records Act is under review, "this standard approach to statutory interpretation is augmented by a constitutional imperative." *City of San Jose*, 2 Cal. 5th at 617. Article I, Section 3, subd. (b)(2) of the California Constitution requires that "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, *shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access*." *See City of San Jose*, 2 Cal.5th at 617, 620; *Sierra Club*, 57 Cal.4th at 166 (emphasis added).

II. The Statutory Framework Governing Production of Electronic Records

The Public Records Act "establishes a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency[.]" *Sander v. State Bar* (2013) 58 Cal.4th 300, 323. The California Public Records Act provides "that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Gov. Code §6250; *see Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1335.

"The California Supreme Court has found this policy especially salient when the subject is law enforcement: 'In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers.'" *Pasadena Police Officers Association v. Superior Court* (2015) 240 Cal.App.4th 268, 283, quoting

Commission on Peace Officer Standards & Training v. Superior Court (2007) 42 Cal.4th 278, 297. "Given the authority with which they are entrusted, the need for transparency, accountability and public access to information is particularly acute when the information sought involves the conduct of police officers." *Pasadena Police Officers Association*, at 283.

The Act defines the term "public record," to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Gov. Code §6252(e). A "writing" is defined as "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." Gov. Code §6252(g). *See City of San Jose*, 2 Cal.5th at 617. Electronic records, including police videos, are clearly "writings" covered by the Act. Gov. Code §6252(e) (writings include "pictures" and "sounds").

The Act requires that "[e]xcept with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering

direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so." Gov. Code §6253(b).

Ordinarily, an agency must respond to a request for public records within 10 days. Gov. Code §6253(c):

> . . . .
> In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched . . . As used in this section, "unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:
> . . . .
> (4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.
> . . . .

The Act contemplates that some records will need to be redacted to delete exempt information. Therefore, "any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law." Gov. Code §6253(a). *See Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 300*; Northern California Police Practices Project v. Craig* (1979) 90 Cal.App.3d 116, 124.

"There is nothing in the Public Records Act to suggest that a records request must impose no burden on the government agency." *State Board of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1190 n. 14. Therefore, government agencies absorb most of the cost. It is well settled that charges for the direct costs of duplication are limited to "the cost of copying" the records. *North County Parents Organization For Children with Special Needs v. Department of Education* (1994) 23 Cal.App.4th 144, 147. This restriction on copying costs applies regardless whether a whole record is produced or a redacted (segregated) copy is produced. The Act makes no distinction. Gov. Code §§6253(b).

However, under some unique circumstances, special rules govern charges for the production of electronic records.

III. *The Statutory Language Governing Production of Electronic Records*

In 2000 the Legislature added a new section to the Act, governing the production of electronic records.[3] Government Code §6253.9 provides (emphasis added):

> (a) Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public

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[3] In 2015 the Secretary of State offered a working definition of an electronic record. "No matter how the electronic record was created, it is important to remember that an electronic record is one that requires a computer to read and translate the information for people to read." California Secretary of State, Electronic Records Guidebook, October 2, 2015 at 2, available at http://www.sos.ca.gov/archives/calrim (accessed June 6, 2017).

record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:

(1) The agency shall make the information available in any electronic format in which it holds the information.

(2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.

(b) Notwithstanding paragraph (2) of subdivision (a), *the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies:*

(1) In order to comply with the provisions of subdivision (a), the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals.

(2) *The request would require data compilation, extraction, or programming to produce the record*.

(c) Nothing in this section shall be construed to require the public agency to reconstruct a record in an electronic format if the agency no longer has the record available in an electronic format.

> (d) If the request is for information in other than electronic format, and the information also is in electronic format, the agency may inform the requester that the information is available in electronic format.
>
> (e) Nothing in this section shall be construed to permit an agency to make information available only in an electronic format.
>
> (f) Nothing in this section shall be construed to require the public agency to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.
>
> (g) Nothing in this section shall be construed to permit public access to records held by any agency to which access is otherwise restricted by statute.

Looking to the language of §6253.9, it is clear that an agency is limited to charging the direct costs of duplication "if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies." Gov. Code §6253.9(a)(2).

However, there is an exception to this general rule limiting costs to the direct costs of duplication (a rule that applies to paper as well as electronic records (*see* Gov. Code §6253(b)). The agency can make the requestor bear the "cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record" when "[t]he request would require data compilation, extraction, or

programming to produce the record." Gov. Code §§6253.9(b), 6253.9(b)(2).

"Data compilation" plainly means putting data together into a newly created record. See Order Granting Writ of Mandate, JA 629. This might include, for example, gathering statistical data or diverse records, and assembling them into one easily accessible record.

Extraction, which is the term relied on by Hayward to charge the Lawyers Guild, is a term that generally means taking something out. See Random House Webster's College Dictionary, Second Edition (1999) ("extract" as "1. to pull or draw out, usually with special effort; to extract a tooth."); JA 173. See also, Order Granting Writ of Mandate at 11, JA 629 ("extraction" means "'to extract something' as in '1: a selection from a writing or or [sic] discourse; Excerpt' and '1 a: to draw forth (as by research) <data> ...," quoting from Merriam-Webster's Collegiate Dictionary (10th Edition 1998, p. 235).

Programming generally means using computer language to automate the process of gathering data.

As the superior court noted: "'[D]ata compilation, extraction, or programming to produce the record' suggests that the three actions apply in similar ways to public records. As a matter of statutory construction, when a group of actions are listed together they are presumed to have similar effect. A public agency could, for example, compile data from disparate sources, or could extract data from a single large document and produce the data pursuant to a CPRA

request, or it could program a computer to obtain data that did not otherwise exist in a readily retrievable form. In all three cases, the public agency would be manipulating public records of existing data to create a new document that could be produced in response to a CPRA request, subject to any review for exempt material." Order Granting Petition for Writ of Mandate, JA 630.

But the statutory use of the word "extraction," which is the sole basis for Hayward's position charging labor costs for redaction of exempt information,[4] does not appear in isolation. The question is: extract for what purpose? Plainly the statutory language says, charging the costs of labor is only permitted when "[t]he request would require data compilation, extraction, or programming *to produce the record*." Gov. Code §6253.9(b)(2)(emphasis added). Charging for production, not reduction, of the record is supported by the text of §6253.9(b)(2). Nothing in the statutory language indicates that the term "extract" means to reduce a record by taking out information that is exempt from public disclosure.

The term "extraction" is used in the context of language concerning "the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record." The key words, here, are "construct" and "produce." Gov. Code §6253.9(b). An agency can charge for the cost of extraction, i.e. pulling information

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[4] See Appellants' Opening Brief at 3-4 ("The dispute is over the meaning of the word 'extraction' in §6253.9(b)(2).").

out, when the extraction constructs a record or it produces a record. The agency cannot charge when the extraction removes information and therefore does not construct or produce a record, that is, when the original record is maintained.

In other words, an extraction puts holes in an existing record. If the information from the extracted holes is then used to construct a record or produce a record, the agency may charge for the process. However, if the original record is produced, but with empty holes, the agency may only charge the direct cost of duplicating the record that remains. The plain language says that the agency may only charge when "The request would require . . . extraction, . . .to produce the record." When Hayward produced the redacted videos in this case it did not generate a record that never existed in that format, it simply copied the videos with the exempt portions deleted.

Where the Legislature uses different terms in a statute, "it is presumed that different meanings are intended." *Las Virgenes Mun. Wat. Dist. v. Dorgelo* (1984) 154 Cal.App.3d 481, 486. *See Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 565. Section §6253.9(b) addresses electronic *data*, which is plainly different from an electronic *record*. The Legislature intended to allow additional charges when the public records request requires pulling data out of an electronic database in order to generate a record. Data is bits of information; a record is "a writing" in tangible form. See Gov. Code §6252(g) (a writing, includes a "recording upon any tangible thing any form of communication or representation").

The Legislature underscored the distinction between data and records in other sections of the Public Records Act. Section 6253(c) (quoted on page 19 *supra*) sets a ten day deadline for responding to a request for records. However, in "unusual circumstances," the time may be extended an additional 14 days. One of the few unusual circumstances listed is "The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request." Gov. Code § 6253(c)(1). Another is "The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data." §6253(c)(4). In other words, a search for "records" is different from compilation, programming or extraction of "data" to generate a record or records that are subject to disclosure. *See* Gov. Code §6253(b). The language shows that compilation, programming, and extraction of data was viewed as potentially burdensome, and therefore the Legislature allowed more time to produce the resulting records, if necessary.[5]

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[5] Hayward never asserted the need to compile data, write a program, or to construct a computer report to extract data as a reason to extend the initial ten day response time required by Gov. Code §6253(c)(4). If this had been the reason, the Act requires it to have given this reason in writing. Gov. Code §6253(c) ("the time limit prescribed in this section may be extended by *written notice* by the head of the agency or his or her designee to the person making the request, *setting forth the reasons for the extension* and the date on which a determination is expected to be dispatched.") (emphasis added).

The court of appeal's opinion in *Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209 is consistent with this analysis. *Fredericks* addressed the scope of disclosure of non-exempt information generated from otherwise exempt records after a "complicated, time consuming review, redaction, and production process to arrange for the release of nonexempt information," police calls for service and incident history reports. *Id*. at 235. It applied the §6255 balancing test to the temporal scope of required disclosure, finding that release of additional records would require six full weeks of full time work. *Id.* at 221. The court held that additional costs may be charged pursuant to § 6253.9(b)(2) if production of newly constructed records would "require generation, compilation and redaction of information *from* confidential electronic records." *Fredericks*, at 238 (emphasis added).

Similarly, the terms "compilation" and "extraction" had been used by the court of appeal in 1993 in a case, like *Fredericks*, that involved pulling non-exempt information out of an otherwise exempt record. In *County of Los Angeles v. Superior Court (Kusar)* (1993) 18 Cal.App.4th 588, the requestor sought records pertaining to all arrests made by two deputy sheriffs. The court held that Gov. Code §6254(f) – generally known as the law enforcement investigatory records exemption[6] – broadly exempted the arrest records from disclosure. *Id.* at 599. The court noted that section 6254(f) "does not authorize the

[6] *See Williams v. Superior Court* (1993) 5 Cal.4th 337, 348.

release of 'records' and 'files' containing the information sought ..., but only of 'information' extracted from the records." *Id.* at 601. By statute the County could only charge the cost of duplication of the information actually produced. The court observed that "[t]his is a restriction which is both reasonable and appropriate where the mandatory disclosure is limited to current records of contemporaneous activity, but totally unreasonable and inappropriate where both generation and compilation of information from historical archives is required." *Id.*[7] Stated differently, the court suggested – years before section 6253.9(b) was enacted – that generation, compilation, and the process of extraction might justify more than charging costs of duplication.

We submit that *Kusar* had used the term "extracted" prior to the enactment in section 6253.9(b), in the context of pulling something out an otherwise exempt record. In using the terms for extraction and compilation, the courts said nothing about redacting out exempt information from an otherwise non-exempt record or file. It is reasonable to assume the Legislature used the term "extract" in the same manner.

The subject of the subsection 6253.9(a) is an "identifiable public record not exempt from disclosure." Subsection (a) says:

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[7] The substantive holding in *Kusar* was overruled by *Fredericks* in light of subsequent amendments to Gov. Code §6254(f). *Fredericks*, 233 Cal.App.4th at 232-233.

> Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record *not exempt from disclosure* pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:
>
> (1) The agency shall make the information available in any electronic format in which it holds the information.
>
> (2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.

(Emphasis added).

Subsection (b) then provides an exception to subparagraph (2) ("notwithstanding paragraph (2) of subdivision (a)") and allows the agency to charge the requester the cost of producing a copy when, among other things, "the request would require data compilation, extraction, or programming *to produce the record*."[8] Section 6253.9 is addressing production of non-exempt records, not reduction of such

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[8] "(b) Notwithstanding paragraph (2) of subdivision (a), the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies: . . . .

(2) The request would require data compilation, extraction, or programming to produce the record."

records through redaction. In other words, subsection (a) says that when an existing identifiable public record is disclosed, an agency may only charge the cost of duplication. Subsection (b) says that when a new record is constructed or produced through compilation, extraction, or programming, an agency can charge additional costs.

The superior court was correct when it held that "The phrase 'data compilation, extraction, or programming to produce the record' therefore logically refers to the construction or production of data to be produced to the recipient, and not to the creation of a redacted version of a previously existing public record." Order Granting Petition for Writ of Mandate at 12, JA 630.

IV. The Statutory Scheme and Objective of the Public Records Act Support a Narrow Interpretation of §6253.9(b)(2)

The entire scheme of the Public Records Act supports a restrictive reading of the cost provision found in section 6253.9(b)(2). A court must "select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results." *Commission On Peace Officer Standards And Training v. Superior Court* (2007) 42 Cal.4th 278, 290.

The Act requires that non-exempt portions of records must be disclosed to a requestor. Gov. Code §6253(a). The Legislature used the language "reasonably segregable portion of a record," to describe the non-exempt part of the record that must be disclosed. *Id.* There is

no distinction in the Act between segregable portions of written records and segregable portions of electronic records. If information is not exempt, and segregable, it must be disclosed.

Section 6253.9(b)(2), allowing additional charges for data compilation, extraction, and programming of electronic records must therefore refer to something other than "segregation" of exempt and non-exempt information found in a record. If the Legislature had intended "extraction" to mean "segregation" with respect to electronic records, it would have used the Public Records Act's statutory term "segregation." It did not.

Had the Legislature used the term segregation in section 6253.9(b), then the process described by section 6253(a) (the segregation requirement) and 6253.9(b)(2) (the provision allowing additional processing charges) would be consistent. Instead, the Legislature used different terms with different meanings. "It is a well recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded." *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 725; *Songstad v. Superior Court* (2001) 93 Cal.App.4th 1202, 1208-09 ("The use of a term in a statute addressing a subject, and omitting that term and using a different term in a similar statute addressing a related subject, shows a different meaning was intended in the two statutes.").

Similarly, the Legislature could have used the term "redaction" in section 6253.9(b)(2).[9] "Redaction" is a legal term of art which was well known in 2000 when section 6253.9(b) was added to the Public Records Act. *See* e.g., *People v. Fletcher* (1996) 13 Cal.4th 451, 464; *Poway Unified School Dist. v. Superior Court (Copley Press)* (1998) 62 Cal.App.4th 1496, 1506 (Public Records Act: "the District has the power to address privacy concerns by redacting released materials.").[10] But instead of using the term redaction, the Legislature choose the term extraction, meaning something different.

The "Act establishes a basic rule requiring disclosure of public records upon request." *City of San Jose*, 2 Cal.5th at 616. Most government records today are kept in electronic databases, not filing cabinets and drawers.[11] An interpretation of section 6253.9(b)(2) that permits an agency to charge labor costs whenever it segregates or redacts exempt information from existing non-exempt

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[9] In 1999 *Black's Law Dictionary* defined "redaction" as "1. The careful editing (of a document), esp. to remove confidential references or offensive material. 2. A revised or edited document." Garner, Black's Law Dictionary (Seventh Ed. 1999), p. 1281.

[10] A Westlaw search of reported California opinions issued prior to 2000 shows 117 cases that use the terms "redact" or "redaction" as terms of art.

[11] While addressing information management, the California Secretary of State has described "the explosion of electronic data generated in recent decades." *See* California Secretary of State, Electronic Records Guidebook, October 2, 2015 at 3, available at http://www.sos.ca.gov/archives/calrim (accessed June 6, 2017).

electronic records, would increase the cost of access to public records merely because they were kept in electronic form. Taking exempt information from a record kept in PDF format[12] would incur labor costs, exceeding the direct cost of duplication, to produce the record. This would mean that the records kept by public agencies in electronic PDF or word processing format that require redaction would cost more than paper copies redacted in the old-fashioned way with a black felt marking pen. Compare, Gov. Code §6253(b) limiting copies to the direct cost of duplication or a statutory fee, regardless of redactions).

"Legislative policy favors disclosure." *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1320. The "right of access to information concerning the conduct of the people's business" is enshrined in the State Constitution. Art. I, Sec. 3(b)(1). "Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.

"The Public Records Act does not differentiate among those who seek access to public information." *State Bd. of Equalization v.*

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[12] Adobe Acrobat, the Adobe Pdf conversion program, includes a redaction tool. See Supplemental Declaration of Amitai Schwartz, Exhs. B and C; JA 506-539. An electronic file in word processing format, such as Microsoft Word, can be redacted with a redaction tool or by simply identifying information to redact and replacing it with a black mark, similar to a marking pen.

Superior Court (1992) 10 Cal.App.4th 1190, 1197. "Access to information concerning the conduct of the people's business is a fundamental and necessary right of every person," whether they are rich or poor, whether they are large companies working to enhance their businesses, or government watchdogs. Gov. Code §6250. Information must be made available regardless of the identity of the requestor. *City of Santa Clara v. Superior Court* (2009) 170 Cal. App. 4th 1301, 1324; *State Board of Equalization v. Superior Court* (1992) 10 Cal. App. 4th 1177, 1190.

If section 6253.9(b)(2) permits additional charges whenever an agency decides to invoke an exemption to disclosure and redacts the exempted information from an electronic record, excess charges will become routine. The Public Records Act will be undermined by the price of access to electronic records.

If Gov. Code §6253.9(b) allows agencies to charge for the cost of redaction, public records that include segregable information will only be available to persons and organizations with the financial means to pay for the time of salaried government employees who produce the records. This will especially become a problem with access to electronic records of police agencies, because many police records, including records of street activity, such as records of demonstrations, shootings, and arrests, contain some exempt information that may be redacted. *See Pasadena Police Officer's Association v. Superior Court* (2015) 240 Cal.App.4th 268, 289-299.

Article I, Section 3, subd. (b)(2) of the California

Constitution requires that section 6253.9(b)(2) must be narrowly construed because it limits access to public records by potentially putting a price on disclosure that would make obtaining copies prohibitive for most requesters, including journalists, researchers, and members of the public seeking government transparency.

"Undoubtedly, the requirement of segregation casts a tangible burden on governmental agencies and the judiciary. Nothing less will suffice, however, if the underlying legislative policy of the [Act] favoring disclosure is to be implemented faithfully." *Northern California Police Practices Project v. Craig* (1979) 90 Cal.App.3d 116, 124..[13] As electronic records, computer devices, and electronic

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[13] Case law interpreting other statutes shows a consistent state policy. For example, *Rubio v. Superior Court* (2016) 244 Cal.App.4th 459, addressed the costs that can be charged to a death row inmate exercising the right to discovery under Penal Code §1054.9. Section 1054.9(d) provides that the "actual costs of examination or copying pursuant to this section shall be borne or reimbursed by the defendant."

The court of appeal held that "where the production of paper or electronic discovery is at issue, a defendant seeking postconviction discovery pursuant to section 1054.9 must reimburse the agency providing the discovery for actual costs related to examination and preparation of documents for production. However, 'actual costs' only includes the labor cost of the employee who actually copies items or transfers them to electronic media, a proportional share of equipment costs, and the cost of the copies, such as the ink, paper, or compact disc." *Rubio*, at 465-466.

The court reconciled the statutory language with the intention

(continued...)

communications proliferate and become ubiquitous, the cost of obtaining government records should be less expensive, not more expensive.

The Act clearly contemplates that agencies ordinarily absorb the cost of redacting (segregating) exempt information.

V. The Legislative History of Gov. Code §6253.9

The legislative history of §6253.9 also supports the superior court's narrow interpretation. Section 6253.9(b) was enacted in 2000 after passage of Assembly Bill 2799. Stats. 2000, Chap. 982, § 2. Schwartz Decl., Exh. H; JA 186; Appellant's Request for Judicial Notice at 28.[14] *See Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 174. "Assembly Bill 2799 was sponsored by the California Newspaper Publishers Association 'to ensure quicker, more useful access to public records.' (Assem. Com. on Governmental Organization, Analysis of Assem. Bill 2799 (1999–2000 Reg. Sess.) as introduced Feb. 28, 2000, p. 2.)" *Sierra Club*, at 174. See Appellant's Request for Judicial Notice at pdf index p. 35.

Initially, Assembly Bill 2799 did not address the cost of electronic records. Among other things, it would have amended §6253 to require release of electronic records in electronic form instead of

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[13](...continued)
of the legislation, observing that "imposing a large bill on defendants would tend to stifle postconviction requests." *Id.* at 484.

[14] Appellants have requested judicial notice of the legislative history of section 6253.9. Respondents do not oppose the request.

allowing an agency to determine the format. It included language saying that direct costs of duplication included costs associated with duplicating electronic records. Appellant's Request for Judicial Notice at pdf index p. 4. *See* Assem. Com. Governmental Organization, Bill Analysis, Assem. Bill 2799 (1999-2000 Reg. Session), April 10, 2000. JA 188; Appellant's Request for Judicial Notice at pdf index 34-35.

The Senate Judiciary Committee added the language concerning charges for electronic records. See AB2799, as amended in the Senate June 22, 2000, Appellant's Request for Judicial Notice at pdf index pp. 19-20.[15] The bill analysis says that the purpose was to make electronic records easily available in order to mitigate the cost of production of paper copies from the records. Sen. Judiciary Com., Bill Analysis, Assem. Bill No. 2799 (1999-2000 Reg. Session), June 27, 2000 ("Apparently, there is not current authority under which a person seeking electronically available records could obtain records in that format - the public would have to buy copies made out of printouts from the records. The expense of copying these records in paper format, especially when the records are voluminous, makes these public records practically inaccessible to the public, according to the

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[15] The Senate amendment also added the language to section 6253(c), providing that the need to "compile date, to write programming language or a computer program, or to construct a computer report to extract date" provided an usual circumstance warranting delay in production. Appellant's Request for Judicial Notice at pdf index p. 19.

author and proponents"). JA 193; Appellant's Request for Judicial Notice at pdf index p. 182.

The legislative history therefore supports our construction of §6253.9. The purpose of the legislation addressing access to electronic records was to assure that records in electronic format would be accessible under the Public Records Act. And, the intention of the Legislature was to make sure that the cost of obtaining copies of identifiable records would not become impractical due to the fact they are stored in electronic form. The objective was to make electronic records as accessible as paper records, but at less cost.

Hayward, on the other hand, argues that snippets from letters in the legislative file show that some agencies and localities were concerned about the cost of redacting electronic records and used the terms "redact" and "redaction." Appellants' Opening Brief at 48-49. But the final legislation did not use the words " redact" or "redaction," despite these concerns and despite the fact "redaction" was a well known legal term of art, applicable to confidential portions of records. The Legislature could have used the word "redaction," or the word "segregable," which appears elsewhere in the Public Records Act (§6253(a)), but choose instead to retain the term "extraction" in the final legislation.

Further, the snippets cited by Hayward do not alter the plain meaning of the statute. *See People v. Albillar* (2010) 51 Cal.4th 47, 57 ("summaries submitted to the Legislature by outside parties cannot alter the plain statutory language the Legislature actually enacted").

These letters hardly show that the Legislature in passing the bill, and the governor in signing it, agreed that it meant an agency could charge for the labor costs of redacting out exempt information from an existing electronic record – costs that would not be chargeable for paper records. The agency letters and third party letters have no weight inasmuch as they are simply the views of specially interested parties. "[T]hese letters state the views of the writers, not the intent of the Legislature." *Hassan v. Mercy American River Hosp.* (2003) 31 Cal.4th 709, 723; *People v. Dennis* (1998) 17 Cal.4th 468, 501 n. 7 (rejecting two letters from groups specially interested).

As a general rule, courts do not even consider individual views of legislators as indications of legislative intent. *Myers v. Philip Morris Companies, Inc*. (2002) 28 Cal.4th 828, 845 ("we have repeatedly declined to discern legislative intent from comments by a bill's author because they reflect only the views of a single legislator instead of those of the Legislature as a whole."); *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 377 ("in construing a statute we do not consider the motives or understanding of the author of a bill or of individual legislators who voted for it."). *See People v. Wade* (2016) 63 Cal.4th 137, 143. Individual views are irrelevant unless they have been lodged as a direct expression of legislative intent in the Journal of the Assembly or Senate or they express a reiteration of legislative discussion. *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699-701.

Hayward's reliance on a letter from the author of the bill adding §6253.9 to the Public Records Act is unavailing. Appellant's Opening Brief at 51.[16] The author's letter does not express the view of the Legislature. It does not necessarily include the views of the legislators who voted for the bill. *California Teachers Assn*. at 700 (letter from bill author to the Governor).[17]

Importantly, the author's letter to the Governor does not say anything about charging for redactions. It only gives a general assurance that costs associated with undefined "extra efforts" would be borne by the requestor. Appellant's Opening Brief at 51; Appellant's Request for Judicial Notice at pdf index p. 358.

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[16] Hayward quotes the author's letter as stating:

> "AB 2799 was amended on June 22, to ensure the bill would not place new burdens on state or local agencies. Specifically, the bill was amended to require the requester to bear the cost of producing a copy of an electronically held record [as set forth in the text of §6253.9(b)]. & This provision guarantees the costs associated with any extra effort that might be required to make an electronic public record available shall be borne by the requester, not the state or local agency."

[17] Similarly, the views of state agencies that commented on the bill, as cited by Hayward (Appellants' Opening Brief at 52-55) are irrelevant inasmuch as the state agencies did not vote on the bill and they are not part of the judicial branch charged with interpreting the law.

VII. Hayward Failed to Justify All the Time Charged

Hayward argues that it is entitled to charge the Lawyers Guild for the time spent redacting exempt information from the original body worn video footage. But even if Hayward's interpretation of Gov. Code §6253.9(b) had been correct, Hayward employee Nataniel Roush did not redact any records. JA 32-69. See Appellants' Opening Brief at 9 ("Roush did not review any videos to determine if they included exempt or non-disclosable material as this is not his 'area of expertise.'" Roush simply located the records in the database previously uploaded to Evidence.com. *Id.* Hayward has not asserted any justification for charging for Roush's labor, despite the fact that disclosure of the police videos was conditioned on payment for his time as well as the time spent by Adam Perez, the records administrator. JA 154.

Should the court accept Hayward's contention that section 6253.9(b) allows an agency to condition production of electronic documents on payment of the cost of redaction, then remand would be necessary for the superior court to determine whether all the time charged for redacting the videos falls within the scope of section 6253.9(b).

CONCLUSION

The judgment of the superior court should be affirmed.

June 28, 2017

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c))

The text of the foregoing brief consists of 8,231 words as counted by the Corel WordPerfect X8 word-processing program used to generate the brief.

Dated: June 28, 2017

/s/ Amitai Schwartz
Amitai Schwartz
Attorney for Respondent

PROOF OF SERVICE BY MAIL

Re: *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward, et al.*, California Court of Appeal, First Appellate District, Case No. A149328

I, Amitai Schwartz, declare that I am over 18 years of age, and not a party to the within cause; my business address is 2000 Powell Street, Suite 1286, Emeryville, CA 94608. I served a true copy of the

Respondent's Brief

on the following, by placing a copy in an envelope addressed to the party listed below, which envelope was then sealed by me and deposited in United States Mail, postage prepaid at Emeryville, California, on June 28, 2017.

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1225 Fallon Street
Oakland, CA 94612

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 28, 2017

/s/ Amitai Schwartz
Amitai Schwartz

STATE OF CALIFORNIA
Court of Appeal, First Appellate District

PROOF OF SERVICE

(Court of Appeal)

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Court of Appeal Case Number: **A149328**
Superior Court Case Number: **RG15785743**

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